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In the

Supreme Court of the United States

October Term, 1940.

No. 34.

L. SINGER & SONS ET AL., *Petitioners,*

vs.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

PETITIONERS' BRIEF.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

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PETITIONERS' BRIEF.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

I.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit appears in the Record beginning at page 33 and is reported in 109 Fed. (2d) 493. The opinion of the District Court for the Western District of Missouri appears in the Record beginning at page 25 and is reported in 26 Fed. Supp. 721.

II.

JURISDICTION.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 936, 28 U. S. C. A. 347).

III.

STATEMENT OF THE CASE.

Nature of Case.

The suit is to enjoin the respondent from building and operating an extension of its railroad consisting of a produce terminal and appurtenant trackage in Kansas City, Kansas, until such time as it has applied for and obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require the construction and operation of said extension. The City of Kansas City, Missouri, filed motion for leave to intervene as a plaintiff (R. 5).

Petitioners' Complaint.

Briefly stated, the complaint (R. 1) alleges that respondent proposes to construct and operate in interstate commerce, at a cost of some $500,000.00, an "extension" of its line of railroad which will serve a large produce market costing approximately $4,000,000.00 which is to be constructed by the respondent and the City of Kansas City, Kansas; that petitioners are produce or commission merchants who own or have places of business within or in connection with a similar market which has long been established in Kansas City, Missouri, and which has adequately served the two cities; and that the Kansas City, Missouri, market is now adequately served by a number of railroads. It is further alleged in the complaint that the change in the transportation situation which will be created by the unauthorized, and therefore unlawful, extension of respondent's line of railroad will directly and adversely affect petitioners' welfare. More specifically,

petitioners would be injured by reason of the fact that the construction and operation of the proposed extension would: Destroy or seriously and adversely affect the businesses, properties and the large financial investments of petitioners within and adjacent to the existing Kansas City, Missouri, market; create a rival produce market, far removed from the center of population and inconvenient to a great majority of the citizens of the two cities, without any increase in the amount of business handled and notwithstanding the fact that the present Kansas City, Missouri, market is entirely adequate; result in unnecessary and wasteful duplication of railroad facilities, at a cost of over $500,000.00, with no increase in freight to be handled; divert traffic to respondent from other railroads which are now adequately handling the traffic to the existing produce market; cause destructive competition between railroads serving the two cities and impair the adequacy of their service to petitioners; and result in wasteful and needless expenditures by respondent.

Respondent's Answer.

Respondent's answer (R. 18) asserted four defenses, the first three of which defenses were: (1) That the court had no jurisdiction over the subject matter of the action; (2) That petitioners are not parties in interest under the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A., Section 1, Par. 20) and were not authorized to institute or maintain any action thereunder; and (3) That the complaint failed to state a claim against defendant upon which relief could be granted.

After filing answer the respondent made application to the court to hear and determine before trial said first

three defenses (R. 22). The hearing was granted, no evidence was offered, and the case was submitted to the court on the pleadings and briefs of counsel.

Opinions Below.

The District Court held that it had jurisdiction of the suit but that the petitioners were not "parties in interest" within the meaning of the statute and hence could not maintain the action, and that, as a consequence, the complaint failed to state a claim upon which relief could be granted (R. 23, 25).

The Court of Appeals for the Eighth Circuit, by a two to one decision, affirmed the decree of the District Court (R. 33). A strong dissenting opinion was written by Judge Stone (R. 40).

IV.

SPECIFICATIONS OF ERRORS.

1. The Circuit Court of Appeals for the Eighth Circuit erred in affirming the decree and judgment of the United States District Court for the Western Division of the Western District of Missouri adjudging and decreeing that petitioners are not, nor are any of them "parties in interest" who may maintain this action under the provisions of paragraph (20) of Section 1 of the Transportation Act (41 Stat. 478, Title 49, U. S. C. A., Sec. 1, Par. 20).

2. The said Circuit Court of Appeals erred in affirming the decree and judgment of said District Court adjudging and decreeing that the complaint fails to state a claim upon which any relief can be granted, for the reason that said complaint states a good cause of action and a claim on which relief can be granted under the provisions of said Transportation Act.

3. The said Circuit Court of Appeals erred in affirming the decree and judgment of the said District Court dismissing petitioners' complaint, for the reason that said complaint states a good cause of action and a claim on which relief can be granted under the provisions of said Transportation Act.

4. The said Circuit Court of Appeals erred in affirming the decree and judgment of said District Court, and in determining that the petitioners are not "parties in interest" within the meaning of said Transportation Act, because such determination is contrary to the purposes of the Act, and conflicts with the decisions of this Court, interpreting the meaning of said phrase, in *Western*

Pacific California Railroad Co. v. *Southern Pacific Company*, 284 U. S. 47, and *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266.

V.

STATUTES INVOLVED.

It is alleged in the complaint that respondent failed to secure a certificate of public convenience and necessity for the construction of the extension, as required by paragraph (18), Section 1, of the Transportation Act, 1920 (Title 49 U. S. C. A., Sec. 1, Par. 18), which provides as follows:

> "(18) No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Petitioners contend that, because the respondent failed to secure a certificate of public convenience and necessity, they are parties in interest who are authorized to maintain the action under paragraph (20) of Section 1, Transportation Act, 1920 (Title 49 U. S. C. A., Sec. 1, Par. 20), which provides as follows:

"(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance or the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; * * *."

VI.

ARGUMENT.

1. Petitioners are parties in interest and authorized and entitled to institute and maintain this action under he laws of the United States and particularly under the provisions of Paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 1, Par. 20).

Paragraph (20) of Section 1 of the Interstate Commerce Act reads in part as follows:

> "Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, *or any party in interest.*" (Italics ours.)

The lower court held that the petitioners are not parties in interest within the meaning of this statute because their interests are not directly affected by the construction and operation of the trackage in connection with the new food terminal. Seemingly the court proceeds upon the theory that the petitioners may not maintain this suit because they do not possess such a clear legal right as would entitle them to relief under the rules commonly accepted by courts of equity. We are not concerned to combat the proposition of whether, in the absence of the statutory provision in question, the petitioners would have no right of action, or to analyze the supporting cases cited by the court below and by the respondent. We rely upon the statute as creating a new and more liberal rule for application in cases of this sort in the transportation

field. This court has already held that such is the purpose and effect of the statute. *Western Pacific California R. R. Co.* v. *Southern Pacific Company,* 284 U. S. 47. The court said in that case (l. c. 51):

> "If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation."

Prior to 1920, the Interstate Commerce Act did not contain paragraphs 18 to 22 of Section 1. These sections were added by the so-called Transportation Act of 1920. Prior to 1920 the Act placed no restraint on competition between the railroads in the way of the construction of competing lines. One line might duplicate the facilities of another although there was no public necessity for so doing. Competition was unrestricted. Congress recognized that the building of unnecessary lines by the carriers, the duplication of facilities already adequate to serve the needs of the public and unrestricted competition between carriers was a matter in which the public had an interest; that such action on the part of carriers imposed a burden upon commerce directly affecting the public interest, and which we allege includes and particularly affects the interests of petitioners because of their businesses and situation. In line with this general theory as to the passage of the Transportation Act, this Court said in *Western Pacific California R. R. Co.* v. *Southern Pacific Company, supra* (l. c. 50):

> "Paragraphs 18 to 22, *supra,* were considered here in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.,* 270 U. S. 266, and were declared to be

> part of the general plan by which Congress intended to promote development and maintenance of adequate railroad facilities. It was there said, p. 277: 'It (Congress) recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563; New England Divisions Case, 261 U. S. 184; Chicago Junction Case, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331. The Act sought among other things, to avert such losses.'"

Thus it will be seen that this Court in the case last cited, as well as in the case of *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, recognized the purpose of Congress in the enactment of these sections of the Act.

The fact that in each of these cases a railroad happened to be the plaintiff does not preclude others designated in the statute from bringing the action. If it had been the purpose of Congress to limit the right to bring injunctive actions of this character to the United States, the Interstate Commerce Commission, or any commission or regulating body of the State or States affected, or to any railroad whose territory is invaded by another carrier, there would have been no need for the addition of the following phrase of the section reading "OR ANY

PARTY IN INTEREST." "Any party in interest" has a broad and comprehensive meaning and certainly should not be construed to mean only "any common carrier affected." Had Congress intended to so restrict its meaning it certainly would not have used such a general and all-inclusive phrase. It clearly was the purpose of Congress by this phrase to extend and not limit or restrict those who might bring the action.

All that is necessary to constitute a plaintiff a "party in interest" within the meaning of the statute is clearly set forth in the opinion of this Court in *Western Pacific California R. R. Co. supra*, wherein the court said (l. c. 51):

> "It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or *that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation.*" (Italics ours.)

The decision of the court below amounts to a holding that a shipper can not be a "party in interest" entitled under the Interstate Commerce Act to maintain an action to enjoin an unauthorized extension of line. It is impossible to conceive a case where a shipper would be more directly and adversely affected by an unauthorized extension than under the facts set forth in the complaint. If petitioners here are without sufficient standing, then no shipper would ever be able to maintain such a suit. It means that only a competing carrier is within the term "party in interest" and that only the carrier is entitled to relief under the statute. Section 1 (18-22) is thus construed as though it were intended solely for the pro-

tection of carriers and not at all for the protection of shippers.

This construction of the statute challenges attention. It is utterly inconsistent with the purpose of Congress in passing the Interstate Commerce Act. The principal purpose in enacting this legislation was to protect shippers from the evils which had arisen under the unregulated management of the affairs of the railroad companies. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 210. "The Act was passed," this court said in *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, 638 "for the protection of those who pay or bear the rates." Every part of the Act, including the provisions under consideration, should be construed with the primary legislative purpose in mind and so far as possible in harmony with it. In this view the only possible construction of the broad term "any party in interest" is that it is intended to include both the carriers and the shippers interested in any given transportation situation.

In conformity with this purpose, it is the policy of the Interstate Commerce Act and related statutes to permit shippers, commercial organizations and cities to participate not only in proceedings before the Commission, but also in those before the courts where the application of these statutes is involved. Any person claiming to be damaged by an interstate carrier may either make complaint to the Commission or bring suit in a Federal District Court. Title 49 U. S. C. A., Sec. 9. Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal corporation, may make complaint to the Commission regarding a violation of the statute. Title 49 U. S. C. A., Sec. 13(1). In proceedings before the Commission or before a District Court

to put a stop to rebates and concessions all persons interested in or affected by the rate, regulation or practice under consideration may be made parties. Title 49 U. S. C. A., Secs. 42, 43. Communities, associations, corporations, firms and individuals who are interested in a controversy before the Interstate Commerce Commission or in any suit brought under the provisions of Sections 20, 43 and 49 of Title 49 may intervene in such suit at any time after its institution, and the Attorney General may not discontinue such suit over the objection of such intervener, but the intervener may prosecute, defend or continue the suit irrespective of the action or nonaction of the Attorney General. Title 28 U. S. C. A., Sec. 45a.

The specific purpose underlying the enactment of the provisions of Section 1 (18-22) now under consideration is in accord with the general purpose underlying the statute of which it is a part. The objective of these paragraphs was not primarily the protection of the railroads, but of interstate commerce. "The certificate issues," the court said in *Colorado* v. *United States,* 271 U. S. 153, 162, "not primarily to protect the railroad but to protect interstate commerce from undue burdens or discrimination." While in that case the issue was one of abandonment of line, the holding of the court is equally applicable to an extension of line because the two things are both covered by the same statutory provisions and grew out of the same legislative policy. Since the primary purpose in both instances is to protect interstate commerce, it must be that the primary protection of the statute was designed for the shippers who keep that commerce alive; and yet these shippers are by the decision below denied any standing in court to maintain an action under the very statute passed for their protection.

Courts have recognized that the phrase "parties in

interest" is not confined to railroads. In *Detroit & M. Ry. Co.* v. *Boyne City G. & A. R. Co.*, 286 Fed. 540 (D. C. E. D. Mich.), one of the plaintiffs was a land owner whose land was sought to be condemned, and it was held that he had the necessary interest. In that case, which was really a consolidation of two cases, the court held (Syl. 4):

> "A railroad company with which a proposed extension by another company will come in competition, or the owner of land over which such extension will pass, is a 'party in interest', within the meaning of Interstate Commerce Act, Sec. 1, Par. 20, as amended by Transportation Act, Feb. 28, 1920, Sec. 402, and may maintain a suit to enjoin construction of such extension in violation of the act."

It is to be observed that this was the holding although, as a matter of law, the plaintiff in that case was entitled to full compensation for damages in the condemnation suit. In the case at bar, on the contrary, petitioners are without any remedy whatever except through this injunction suit. In *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, the owner of a ferry boat situated about twenty miles from the site of the proposed extension was held to be a party in interest under Section 1 (20) of the Act.

It was decided in *Atchison Ry.* v. *Railroad Com.*, 283 U. S. 380, 393-394, that a city has "a proper interest in the subject matter" entitling it to present an application before the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing interstate railroads entering the city to construct a union passenger terminal, overruling the contention that the carriers alone had sufficient standing to present such an

application. If a city has a sufficient interest to secure a certificate for a terminal within its own boundaries, it would clearly seem to have sufficient interest to oppose a certificate for a competing terminal located in a rival city. The City of Kansas City, Missouri, is, therefore, clearly a party in interest entitled to enjoin the unauthorized construction of the produce terminal in the case at bar. By the stronger reason the other petitioners who are shippers possessing an even more immediate relation to the transportation situation are likewise entitled to maintain a suit for that purpose.

The court below held that although the proposed extension of respondent's line may adversely affect the petitioners' welfare, it will not do so directly but only indirectly and consequentially. Petitioners submit that their welfare will be directly as well as adversely affected, as was held by Judge Stone in his able dissenting opinion in this case.

The injuries to which petitioners will be subjected, according to the allegations of the complaint, were concisely summarized by Judge Stone. He said that the construction and operation of the proposed extension would: (a) destroy or seriously and adversely affect the businesses, properties and large financial investments of plaintiffs in and adjacent to the existing Kansas City, Missouri, produce market; (b) create a rival market far removed from the center of population and inconvenient to a great majority of the citizens of the two cities; (c) create a rival market with no increase of produce business when the present market is entirely adequate to serve the entire community; (d) result in an unnecessary duplication of railroad facilities at a cost of over $500,000 with no increase in freight to be handled; (e) divert traffic to defendant from other railroads which are now adequately

handling the traffic to the existing produce market; (f) cause destructive competition between railroads operating in the vicinity; and (g) result in wasteful and needless expenditures by defendant (R. 41).

The conclusions of the majority below with respect to the indirect and consequential character of the injury seems to be bottomed upon the view that all that defendant Union Pacific Railroad Company is doing is to construct trackage to serve a competing market being constructed by Kansas City, Kansas (R. 35-36). This is a serious misconception of the allegations of the complaint. The allegation is not that Kansas City, Kansas, alone is building the new market but that the Union Pacific and the City are "now engaged in building a so-called 'food terminal' or produce market" (R. 2). Since the railroad and Kansas City, Kansas, are engaged in the construction of terminal facilities for the receipt and distribution of produce, the case is not, as the lower court incorrectly assumed, one where the injury is threatened by the extension of trackage by a railroad to serve an industry built by a third party, but one where the railroad and a third party are joining together in the construction of a terminal for the receipt, sale and distribution of produce moving in interstate commerce. In this view, the participation of the respondent in causing the injuries complained of cannot be other than direct and immediate.

The serious injury which may be inflicted on shippers by the construction and operation of duplicate produce terminals is illustrated by the decision of the District Court below in another case involving this same terminal. *United States* v. *Union Pacific* (1940), 32 F. Supp. 917, 34 F. Supp. 4. As the decisions in that case show, when the District Court denied relief to petitioners, the respondent and the City of Kansas City, Kansas, went ahead with

the construction of the new food terminal including the necessary trackage. As one means of promoting the success of the new terminal they formulated a deliberate plan to destroy the market in Kansas City, Missouri, in which petitioners are financially interested; and as one means of consummating this plan they attempted to move the produce center of Greater Kansas City to their terminal by offering monetary payments and other concessions to the more important or influential shippers to induce them to move to the new location. While the lower court in the case cited enjoined this particular method of carrying out the plan to destroy the business and property of the petitioners, the threat of achieving the same end by other methods of operating the new terminal is an ever-present danger to these petitioners.

Despite the pendency of this suit, the respondent has proceeded with the construction and operation of the produce terminal facilities including the railroad trackage. This does not render the case moot for the reasons stated by this court in a parallel case *Texas, Etc., R. R.* v. *Northside Ry.*, 276 U. S. 475, 479.

> "Paragraph 20 of Sec. 402 specifically provides that unauthorized operation as well as construction may be enjoined. Moreover, the facts erroneously found would not, if true, have rendered the case moot. For where a defendant, with notice of the filing of a bill for an injunction, proceeds to complete the acts sought to be enjoined, the court may, by mandatory injunction, compel a restoration of the *status quo*."

The Interstate Commerce Act is, in general, highly remedial legislation, and the intention of Congress to provide all parties injured as a result of its violation with a remedy is evidenced throughout. We think it is evident

that Congress had no intention of departing from that policy in the provisions of the Transportation Act here under consideration.

In *Piedmont & Northern R. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, this court said at pages 311-312:

> "The Transportation Act was remedial legislation, and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

That policy should be given effect in construing the statutory provisions involved in the instant case.

If petitioners are not parties in interest within the meaning of paragraph (20) of Section 1, they are without remedy under the Act. They may not complain to the Interstate Commerce Commission, for it has no power to enjoin unauthorized construction or operation of a line. The statute makes suit for injunction in the District Court the exclusive remedy. *Texas & Pacific Ry. Co.* v. *Gulf, etc., Ry. Co.,* 270 U. S. 266. In that case the court said at page 273:

> "• • • A party in interest who is opposed to the construction is not authorized by the Act to initiate before the Commission any proceeding concerning the project. If application for a certificate has been made, he may appear there in opposition. If no such application has been made, paragraph 20 affords him the only remedy. That remedy is both affirmative and complete."

This Court also held in *Powell* v. *United States,* 300 U. S. 276, that the question as to the right of a railroad

to construct or operate a track without first securing a certificate cannot be raised by instituting a proceeding before the Commission under other provisions of the Interstate Commerce Act. The Court said (l. c. 288):

> "Plainly, the Central (Central of Georgia Railway Company) mistook its remedy. By its complaint against the tariff is sought an order of the Commission equivalent to a decree of court in a suit under Section 1 (20) enjoining the Seaboard from extending its service because contrary to Section 1 (18). The order, as construed and supported by appellees, is the practical equivalent of such a decree. The governing statutory provisions do not permit substitution of the Commission's order for a decree of court."

and (p. 289):

> "The statutes cannot be construed to give the Commission, a carrier or other party seeking to enforce Section 1 (18) a choice of remedies; i. e., between a proceeding before the Commission to invalidate the applicable tariff and a suit under Section 1 (20). The latter is exclusive."

Since shippers injured by an unauthorized extension have no other remedy, and since it cannot be that Congress intended shippers injured as a result of such an unlawful act should be without remedy, it is apparent that Congress meant to include them among the parties in interest who, under paragraph (20) of Section 1, are entitled to maintain a suit in a District Court to enjoin an unlawful extension of service.

In considering whether petitioners are parties in interest within the meaning of the statute, the allegations of the complaint must be accepted as true and every presumption resolved in favor of the sufficiency of the plead-

ing. Under such construction of the complaint and under the decisions heretofore cited, petitioners clearly are parties in interest under the statute and are authorized to institute and maintain this action.

2. The complaint states a claim upon which relief can be granted.

We believe we have shown under Point I that the petitioners are "parties in interest" within the meaning of the Act and are entitled to bring and maintain this action. That being true, the complaint states a cause of action upon which relief can be granted. Surely the complaint amply meets the requirements of the new rules of civil procedure for District Courts and states a cause of action entitling petitioners to have the case heard on its merits. To reach a contrary conclusion it is necessary either to disregard the allegations of the complaint or to hold as a matter of law that a shipper cannot be adversely affected by a material change in a transportation situation vital to his economic survival.

Conclusion.

It is clear from the foregoing that if the allegations in the complaint are true (and for the purpose of respondent's application to hear and determine certain defenses in advance of trial they must be accepted as true) the respondent is attempting to extend its tracks in violation of law. The one-half million dollars respondent is expending for tracks and the three million dollars for bonds, all are a part of the same plan. A part of the three million dollars will be spent for tracks to be built by the city of Kansas City, Kansas, but all of this trackage petitioners allege and respondent admits is to be operated by

respondent. The extent, length, connections and total cost of this trackage and respondent's investment in *revenue* bonds, are all important in determining whether this is an extension and its effect upon the welfare of petitioners. All of this is a matter of proof, which petitioners should be permitted to adduce at the trial.

Without a single decision holding that a shipper cannot be among those whose welfare may be directly and adversely affected by a carrier's unauthorized action bringing about some material change in vital transportation and in the light of the broad language of paragraph 20, Section 1, of the Interstate Commerce Act to the effect that any construction "* * * contrary to the provisions of this paragraph may be enjoined by any court of competent jurisdiction at the suit of * * * any party in interest * * *," how can it be said that it clearly appears on the face of the complaint that petitioners cannot adduce sufficient evidence at the trial to support their allegations that said extensions "will directly and adversely affect the property interests of the plaintiffs and the public generally by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce directly and adversely affecting the welfare of plaintiffs and the public interest"?

Summarizing, we respectfully urge with all the earnestness of which we are capable:

(1) Congress meant by the term "any party in interest" to include not only any one who might maintain an action in the absence of statute but also any one, whether carrier or shipper or municipal corporation, who has an interest in fact in the immediate transportation situation which would be adversely affected by the extension of a line of railroad.

(2) The primary purpose of the Interstate Commerce Act is the protection of shippers, and to construe the term "any party in interest" as not including shippers whose competitive position would be adversely affected by an extension of line and who are interested in or affected by the immediate transportation situation would be contrary to that purpose.

(3) Shippers and a city immediately interested in a transportation situation are directly affected within the purview of the statute as they are directly affected in fact by the construction of competitive terminal facilities in a rival city.

(4) Petitioners are parties in interest and authorized and entitled to institute and maintain this action under the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act.

(5) The complaint states a claim upon which relief can be granted.

We further urge that the opinion and judgment of the court below should be reversed so that the petitioners may be permitted to offer proof of their interest and to show in what respects and to what extent their welfare may be adversely affected by the unlawful extension of respondent's lines of railroad.

Respectfully submitted,

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